LIBRARY
SUPREME COURT, U. S.

FILED
MAR 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974

No. 74-1136

KAREN DERBY, P.P.A.

Petitioner

v.

THE CONNECTICUT LIGHT AND POWER COMPANY

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William B. Fitzgerald, Jr.
~~Walter B. Torrance, Jr.~~
Carmody & Torrance
P. O. Box 1110
Waterbury, Conn. 06720
Telephone: (203) 757-1521

Attorney for Respondent

Opinions Below

The opinion of the Supreme Court of Connecticut in this matter is officially reported in 36 Conn. L.J. No. 8, page 14 (1974). A copy of this opinion is appended to the petition.

Jurisdiction

The petitioner (hereinafter referred to as plaintiff) invokes the jurisdiction of this Court under 28 USC §1257(3), apparently claiming that she has been denied due process of law by the action of the Supreme Court of Connecticut in setting aside a judgment in her favor in a personal injury action and directing judgment for the defendant notwithstanding the verdict.

The portion of the Constitution of the United States relevant to such a claim would be the "due process" clause of Amendment XIV §1, providing: "Nor shall any State deprive any person of life, liberty or property, without due process of law".

Statement of the Case

The plaintiff brought an action in the Connecticut Superior Court to recover damages for personal injuries allegedly sustained when she fell from an apple tree located on property of the respondent (hereinafter referred to as defendant).

The case was tried to a jury, and when all the evidance had been submitted, the defendant made a motion for a directed verdict. The trial court reserved decision on the motion and committed the case to the jury. The jury rendered a verdict for the plaintiff, and the trial court refused to set the verdict aside and enter a judg-

ment notwithstanding the verdict. The defendant then appealed to the Connecticut Supreme Court, which reversed and ordered judgment for the defendant notwithstanding the jury's verdict.

The plaintiff claimed to have demonstrated in the trial court that the defendant had violated the duty imposed by the common law of the State of Connecticut upon a landowner to make certain conditions on his land safe for tolerated trespassers or to warn them of such conditions. The Supreme Court held that the case was improperly submitted to the jury because the plaintiff had introduced no evidence to support one of the essential elements of her cause of action — that the defendant had knowledge or reason to know of the particular condition which injured the plaintiff.

Question Presented

No federal question is presented by this petition. The only conceivable constitutional claim which may be inferred from the petition is that the Connecticut Supreme Court order that judgment enter for the defendant notwithstanding the verdict invaded the province of the jury and therefore denied the plaintiff due process of law. The gravamen of the petition appears to be that the action of the court below in setting aside the jury's verdict and ordering judgment entered notwithstanding the verdict "transmutes propositions of fact into propositions of law". Petition, page 2.

Argument

1) THE PETITION IS OUT OF TIME AND THEREFORE THIS COURT LACKS JURISDICTION TO CONSIDER IT.

This court lacks jurisdiction to hear this petition because it is out of time. The decree of the Connecticut Supreme Court sought to be reviewed was rendered on August 20, 1974. The time for filing a petition for a writ of certiorari expired 90 days later, on November 18, 1974. 28 USC §2101(c). The petition was not filed until March 10, 1975. The first "Motion for Extension of Time for Completion and Filing of Writ of Certiorari" in this case was dated January 7, 1975 and filed on January 10, 1975.

Supreme Court Rule 34(2) required that this motion be submitted at least ten days before the expiration of the period sought to be extended. Since the 90 day period within which a writ of certiorari could have been filed expired on November 18, 1974, the period within which the motion for extension of time could have been properly filed expired on November 8, 1974. Both dates were, of course, well prior to January 10, 1975, when the motion was actually filed.

As the appendix to the petition discloses, the plaintiff filed two motions for reargument in the Connecticut Supreme Court. However, these motions were not sufficient to suspend the finality of a decree under Connecticut practice. Under the rules of the Supreme Court of Connecticut: "A motion for reargument will not be entertained unless filed in writing within ten days from the date when the decision is announced." Connecticut Practice Book 1963, 1974 Cumulative Supplement, §703. The first motion for reargument was dated September 3, 1974, and was received for filing on September 5, 1974. It was thus

clearly out of time. Since the motion was out of time, its filing did not suspend the finality of the state court's judgment and therefore did not toll the running of the period limited for the filing of a petition for a writ of certiorari in the Supreme Court of the United States. **Department of Banking v. Pink,** 317 U.S. 264 (1942).

2) THE PETITION IS FRIVOLOUS.

Assuming, arguendo, that this court does have jurisdiction to consider this petition, it should be denied. It seems to request this court to examine the evidence presented in the trial court to see whether the Connecticut Supreme Court's order that a judgment n.o.v. be entered was justified by the evidence. The plaintiff thus seeks to make a writ of certiorari serve the purpose of a writ of error. To the extent that the petition may be interpreted to claim any deprivation of due process, it must be taken to claim that the state appellate court may not constitutionally overrule a jury verdict.

Of course, it has long since been settled that a state court infringes no constitutional right in taking any such action. In **Wagner Electric Manufacturing Company v. Lyndon,** 262 U.S. 226 (1923), the appellant claimed that the action of a State Court in directing a verdict against it without evidence to warrant such action deprived it of its property without due process of law, and denied it the equal protection of the laws. In denying this claim, the court stated, at 262 U.S. 231, 232:

> "The only grounds urged by the appellant for a reversal of the decree dismissing the bill of complaint are frivolous and without merit. The first involves the proposition that, in a collateral attack upon the validity of a judgment in a state court, a Federal court

> can examine the evidence to see whether a direction by the Court to a jury to find a verdict was justified by the evidence. This would be to make such an attack serve the purpose of a writ of error. More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by **C. A. Treat Mfg. Co. v. Standard Steel and I. Co.,** 157 U.S. 674, 39 L.ed. 853, 15 Sup. Ct. Rep. 718), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution."

The respondent therefore respectfully represents that the petition for a writ of certoriari to the Supreme Court of Connecticut should be denied.

RESPONDENT,

THE CONNECTICUT LIGHT
AND POWER COMPANY

William B. Fitzgerald, Jr.
By: [illegible]
Its Attorney